DP Vijandran v Karpal Singh & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2(S5)-23-29 OF 1997
KAMALANATHAN RATNAM J
3 MAY 2000

Evidence *— Adverse inference — Failure to call witness — Plaintiff testifying on certain matters concerning a party — Plaintiff not calling the party as a witness — Plaintiff not cross-examined on matters concerning that party — Whether adverse inference should be drawn against plaintiff for not calling the party as a witness*

Evidence *— Judgments, when relevant — Production of prior judgment, effect of — Whether merely to establish existence of prior judgment — Whether gives rise to presumption that prior judgment is the correct decision on the matter*

Legal Profession *— Law Society/Malaysian Bar — Complaint against solicitor — Plaintiff solicitor issuing cheque drawn on closed clients' account to first defendant solicitor — Bona fide error on the part of plaintiff solicitor — Whether disciplinary action would arise against plaintiff solicitor — Press statement maligning plaintiff solicitor issued by first defendant solicitor — Press statement made in first defendant's capacity as politician — Whether first defendant solicitor had gone beyond requirements of the Legal Profession (Practice & Etiquette) Rules 1978 — Whether conduct of first defendant solicitor reflected a conflict of interest — Whether conduct of first defendant indicated extent of his malicious and vituperative intentions*

Newspapers *— Libel — Press statement — Press statement and article based on press statement published in newspapers — Whether published statements tended to lower plaintiff in the estimation of right-thinking members of society generally — Whether published statements would cause plaintiff to be shunned or avoided or would expose him to hatred, contempt or ridicule — Whether published words defamatory*

Tort *— Defamation — Libel — Defence — Qualified privilege — The public interest — Distinction between 'that which the public is interested in' and 'that which is in the public interest'*

Tort *— Defamation — Libel — Defence — Justification — Defendant to show in defence meaning of words he seeks to justify*

Tort *— Defamation — Libel — Evidence of plaintiff's character — Whether to be confined to area of his life or character libelled*

Tort *— Defamation — Libel — Damages for — Compensatory damages, how assessed*

Tort *— Defamation — Libel — Damages for — Aggravated damages, how assessed*

Tort *— Defamation — Libel — Press statement — Allegation by first defendant that plaintiff's case fatal as actual words in press statement issued by first defendant not reproduced in newspaper articles — Whether necessary for every word of first defendant to be reported in newspapers — Whether sufficient for plaintiff to prove that words said by defendant substantially the same as pleaded in statement of claim*

A ***Tort*** *— Defamation — Libel — Press statement — Allegation by second defendant newspaper that their publication of impugned words less serious due to absence of word 'cheat' — Whether merely a matter of semantics — Implication of words published by second defendant when given their ordinary meaning*

B ***Tort*** *— Defamation — Libel — Press statement — First defendant making press statement with express intention that statement would be published in newspapers — First defendant 'requested, procured or authorized publication' of press statement — Whether first defendant responsible for newspaper reports of his press statement*

C ***Tort*** *— Defamation — Malice — Cheque issued to first defendant by plaintiff from closed clients' account — Plaintiff's explanation of a bona fide error communicated to first defendant — Replacement cheque sent by plaintiff and received by first defendant's firm — First defendant subsequently issuing press statement maligning plaintiff — Complaint to Bar Council and Disciplinary Board against plaintiff by first defendant — Police report against plaintiff lodged by first defendant — Press statement, complaints, report made notwithstanding plaintiff's explanation and in suppression of material facts — Whether actual malice shown on the part of first defendant*

D

Tort *— Defamation — Pleadings — First defendant's pleadings alleging plaintiff convicted of a most serious offence — Plaintiff in actual fact acquitted of the most serious offence — First defendant failing to amend pleadings — First defendant not stating in pleadings that plaintiff an actor in a pornographic film — Whether trial court could*

E *consider a previous Court of Appeal finding that plaintiff was an actor in a pornographic film*

Tort *— Defamation — Proceedings — Certified Bahasa Malaysia translation of impugned words not tendered in the course of proceedings — Plaintiff provided literal Bahasa Malaysia translation instead — Whether literal translation sufficient — Whether*

F *for first defendant to provide court with alternate version of translation if disputing plaintiff's version*

The plaintiff had sued the first defendant on another matter, lost and was ordered to pay the first defendant taxed costs of RM9,414.38 ('the sum'). The plaintiff had himself been charged for a criminal

G offence and as a result the Bar Council had refused to issue him a Sijil Annual to enable him to practise. As a result, the plaintiff was compelled to close his law office and let his staff go. The plaintiff had operated two clients' accounts — one with Bank Buruh ('the Bank') and the other with Bank of Commerce. The plaintiff had closed the

H account with Bank Buruh and had transferred all funds to the account with the Bank of Commerce. On 9 February 1996, the plaintiff having decided to settle the sum with the first defendant quietly, posted a cheque for the said sum drawn on the Bank Buruh account to the first defendant's firm. According to the plaintiff, when his staff was with him, he did not write cheques. Therefore when he had to write the

I cheque for the first defendant, he used a cheque book lying on top of a bunch of cheque books and with the words 'Clients' Account'. As the words 'Account Closed' were not endorsed on the said cheque

book, he thought it was all right to issue the cheque from the Bank Buruh account. A

On 16 February 1996, the plaintiff received a phone call from the Bank informing him that the cheque had been issue from a closed account. He was on the same day informed by one Mr Indran, an accountant with the first defendant's firm that there was a problem B with the cheque. On the same day, the plaintiff made out a replacement cheque for the same amount, addressed a letter to the said Mr Indran and indicated in the letter that the earlier 'cheque was issued from the wrong account due to a clerical error'. The letter was faxed through to the first defendant's firm the same day and the said Mr Indran agreed to the plaintiff's proposal that he could post the C cheque notwithstanding the fact that a long stretch of holidays was imminent. On 28 February 1996, the plaintiff posted the letter dated 16 February 1996 and the replacement cheque to the first defendant whose firm received the same on 1 March 1996. However on 2 March 1996, the first defendant issued a press statement inter alia alleging: D that the plaintiff's conduct in issuing a cheque which was dishonoured amounted to a serious offence of cheating under s 420 of the Penal Code; the plaintiff's conduct was dishonourable and rendered him unfit to be on the rolls of Advocates and Solicitors in the country; and that the country could ill afford to have the plaintiff in the legal profession. The second defendant published the contents of the press E statement in the *Sunday Star* on 3 March 1996 whereas the third defendant published an article in the *New Straits Times* on 5 March 1996. On 4 March 1996, the plaintiff telephoned the said Mr Indran who confirmed that he had appraised the first defendant about the plaintiff's explanation of the wrong cheque being sent and the subsequent replacement with the valid cheque. The plaintiff F contended that the conduct of all the defendants had gravely injured him in his professional standing, character, credit and reputation and that he had been brought into public scandal, odium and contempt and sued inter alia for damages for libel. The first defendant raise in his defence and submissions inter alia the following issues: (i) that the G plaintiff ought not to have dealt with Mr Indran as the latter was not a lawyer; (ii) as the actual words stated in his press statement were not reproduced in the newspapers, this was fatal to the plaintiff's case; (iii) that since a certified translation of the words in Bahasa Malaysia had not been tendered in the course of proceedings, the plaintiff's claim should be dismissed; (iv) that it was necessary for him to report H to the Bar and the police; and (v) the court ought to invoke the principle in s 114 (g) of the Evidence Act 1950 and draw an adverse inference against the plaintiff for failing to call Mr Indran to testify. The second defendant contended that the words published in the *Sunday Star* were not capable of having a defamatory meaning or in any case were less serious because of the absence of the word 'cheat'. I The third defendant raised the defence of justification and in submissions counsel argued that the impugned words had a different

A meaning. Both the second and third defendants also claimed an indemnity against the first defendant.

Held, allowing the plaintiff's claim:

B (1) The court would accept the explanation as to why the plaintiff had issued the cheque from the closed Bank Buruh clients' account. His explanation disclosed a genuine mistake with no ill-intention to mislead or deceive the first defendant. With regard to whether the plaintiff ought to have dealt with Mr Indran since Mr Indran was not a lawyer, it had to be assumed, in the absence of Mr Indran testifying, that he (Mr Indran) had the authority to C communicate with parties issuing cheques and who were in a similar situation as the plaintiff was. Further as the plaintiff was suspended and not in practice, the plaintiff was then not a lawyer and it was in order for the plaintiff to have dealt with Mr Indran (see p 41B–D).

D (2) The words published in both the *Sunday Star*, and *New Straits Times* in their natural and ordinary meaning meant that the plaintiff had committed the criminal offence of cheating under s 420 of the Penal Code. It also meant that the plaintiff was not a fit and proper person to act as a solicitor and that the Bar Council E ought to, on the basis that the plaintiff had committed such a criminal offence, strike the plaintiff off the rolls as an advocate and solicitor. By calling the plaintiff a cheat as having committed an offence under s 420 of the Penal Code, the defendants had clearly imputed that plaintiff was a criminal who was unfit to hold the profession of an advocate and solicitor. The statements as F published would tend to lower the plaintiff in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule. It was beyond doubt that the words were in fact defamatory (see pp 41E–F, 42D, F).

G (3) The plaintiff's explanation relating to the bona fide error was not challenged in cross-examination by the defendants and neither was it put to the plaintiff that he acted dishonestly. The law presumed the falsity of the words stated and the onus was on the defendants to rebut the falsity of the words stated. The onus was on the defendants to rebut the said presumption and they had not H done so. The allegations made against the plaintiff of cheating and of dishonourable conduct were therefore absolutely false (see pp 42G–43A).

(4) There was actual malice on the part of the first defendant. The plaintiff's evidence that Mr Indran had informed him that he had I informed the first defendant that the replacement cheque had already been received prior to the press statement was unrebutted. It stood unchallenged therefore that the first defendant was well

aware that when he made the press statement he knew that there was a genuine error on the part of the plaintiff. In his complaint to the Disciplinary Board, the first defendant had omitted to enclose correspondences which would show the genuineness of the plaintiff's error. Even in his police report, the first defendant had failed to mention many material facts. The first defendant further suppressed material facts when he made the press statement (see p 43B–F). A B

(5) The sting of the libel as stated in the press statement was contained in both the publications. There was no doubt that the newspaper articles carried the actual words of the first defendant and in some areas repeated the first defendant's words in the form of indirect speech. There was no requirement that every word of the first defendant had to be reported in the publications. The first defendant did not allege that any significant part of his statement had been left out nor did he allege that the part left out would vary the meaning of the part the plaintiff contended was defamatory of him. The plaintiff is not required to prove that what is alleged in the statement of claim is exactly what the defendant said. It is sufficient if the plaintiff proves that the words said by the defendant are substantially the same as those pleaded in the statement of claim (see pp 43I–44B, G–H). C D

(6) If a defendant gives a press statement for publication, or in the expectation that it would be published, he becomes responsible for the republished version even if it is an edited version. On the facts, the first defendant was liable as the publisher of the libel in the two newspapers since he requested, procured or authorized the publication. On the basis of the law relating to republication, the first defendant was responsible for the newspaper reports as fully as if he himself had published the said reports (see pp 44I–45A, F–G). E F

(7) The first defendant failed to see the distinction between the requirement of a literal translation and a certified translation. In the instant case, the plaintiff had indeed provided a literal translation in Bahasa Malaysia and if such a literal translation as provided by the plaintiff was in dispute, it was for the first defendant to provide the court with his alternate version, which he failed to do (see p 46B-C). G H

(8) The first defendant went beyond what was required of him and of the Legal Profession (Practice & Etiquette) Rules 1978 ('the Rules'). Though the first defendant was right in referring to the Bar Council, the explanation of the plaintiff would have justified not having to refer the matter to the Bar Council as a bona fide error by an advocate and solicitor can never be the basis for disciplinary action against him. In the instant case, not only did the first defendant refer the plaintiff to the Bar Council but he I

accused the plaintiff of committing a criminal offence of cheating under s 420 of the Penal Code. Further the Rules did not authorize the plaintiff to give a press statement. The press statement made in the first defendant's capacity as a politician reflected a conflict of interest and was tantamount to using political mileage to gain an unfair advantage over the plaintiff. The making of the press statement and calling of its publication showed the extent of the malicious and vituperative intention of the first defendant (see pp 46F–H, 47B–C).

(9) The first defendant's submission on drawing an adverse inference against the plaintiff was unacceptable. The plaintiff had testified that it was Mr Indran who first telephoned him and had confirmed his conversation with Mr Indran in writing, which document was in the bundle of documents. The plaintiff was never cross-examined on the matters relating to Mr Indran. Thus the plaintiff having proved the matters relating to Mr Indran, the onus shifted to the first defendant to call Mr Indran, if he intended to dispute any of the evidence (see p 47D–E).

(10) Although the second defendant had scrupulously avoided the use of the word 'cheat', that was a matter of semantics. The words published of the plaintiff by the second defendant when given their ordinary meaning implied that the plaintiff had indeed committed the criminal offence of cheating under s 420 of the Penal Code and that for this reason he was not a fit and proper person to act as a lawyer and that based on this fact the Bar Council ought to cause the plaintiff to be struck off the rolls as an advocate and solicitor. To compound the libel, the second defendant had used the word 'bounced' — a commonly used term usually denigrating the issuer of a cheque as one devoid of any financial integrity (see pp 47G–48B).

(11) The second defendant was not entitled to raise the defence of qualified privilege as the press statement of the first defendant did not fall into any of the categories referred to in Part 1 of the Schedule to the Defamation Act 1957. The element of public interest which is a quintessential aspect of the defence of qualified privilege was completely non existent in the instant case. The second defendant had failed to appreciate the real and very important distinction between 'that which the public is interested in' and 'that which is in the public interest'. The first category pandered to the draw of the public and for which the courts would not lend their protection, whereas the second category catered for the benefit of the public and for which the courts would certainly extend their protection (see p 49C, E–F, H–I).

(12) A defendant in a defamation suit need not necessarily give a meaning to the words complained of. However if the defendant

pleads justification, he must show in his defence either as a specific averment, or in the particulars relied on, the meanings he seeks to justify. On the facts, since the third defendant did not even seek leave to amend its defence, it was certainly taking the plaintiff by surprise to ascribe to the words complained of, a different meaning and to thus depart radically from its pleaded defence. Where a defendant sets up a defamatory meaning different from that contended by the plaintiff, and seeks to justify such different meaning, he must clearly and unequivocally state the meaning he seeks to justify (see pp 50E–F, 51B).

(13) The first defendant's attack on the plaintiff's character was based on his alleged conviction of a most serious offence. Nowhere in his pleadings did the first defendant aver that he sought to mitigate damages on the ground that the plaintiff was an actor in a pornographic video. However even though the plaintiff was acquitted of the most serious offence, the first defendant failed to amend his pleadings. In the absence of any amendment, it was not just and proper for the court to consider the earlier finding of the Court of Appeal that the plaintiff was a male actor in a pornographic video. If the defendants had intended to pursue the finding of the Court of Appeal that the plaintiff was the actor in the pornographic video, even if no amendments had been applied for, the defendants should have with leave of court applied to cross-examine the plaintiff on the allegation, indicating to the court that the purpose of the cross-examination would be to mitigate damages (see pp 51H–52A, D–E).

(14) The first defendant sought to admit a certain passage from the judgment of the Court of Appeal as evidence in the instant case. However the existence of the judgment was not a fact in issue in the instant case. The production of a previous judgment merely establishes the existence of a prior decision and there is no presumption that a prior judgment is the correct decision on the matter. There is nothing in the Evidence Act to warrant the conclusion that the statements or findings of fact in another case can be used as evidence in a subsequent case to decide the points which are in issue in the subsequent case (see pp 53G, 54D, G–H).

(15) Any evidence as to the character of the plaintiff must be confined to the particular area of his life or character that has been libelled. On the facts, it could not be said that the alleged libel had any connection with the finding of fact by the Court of Appeal in respect of the plaintiff's performance as a pornographic actor in a video (see pp 55H–I, 56A–B).

(16) In assessing compensatory damages in the instant case, the High Court considered the following factors: (i) personal distress and hurt suffered by the plaintiff and his pregnant wife; (ii) that the

plaintiff's professional standing had been affected; (iii) the first defendant's complaint to the Bar Council and the Disciplinary Board; (iv) the first defendant's police report; (v) the social standing of the parties; and (vi) the second and third defendants abject failure to verify before publication. Having regard to all the factors, the plaintiff should be awarded a sum of RM250,000 as compensatory damages against the first defendant. As against the second and third defendants, the plaintiff should be awarded a sum of RM100,000 against each of them (see pp 56H–58G).

(17) In assessing aggravated damages, the court had to consider the following factors: (i) the conduct of the first defendant; (ii) the suppression of material facts by the first defendant; (iii) the repetition of the libel by the first defendant; (iv) the plaintiff's standing as a lawyer had been affected; (v) the first defendant had not shown any remorse or tendered any apology; (vi) the second and third defendants' failure to verify before publishing; (vi) the second and third defendants' blatant refusal to give a copy of the first defendant's press statement to the plaintiff despite repeated requests; (vii) the second and third defendants' failure to publish an apology. Having considered all the factors, the plaintiff should be awarded a sum of RM250,000 as against the first defendant and as against each of the second and third defendants a sum of RM100,000 each (see pp 58G–61C).

(18) The plaintiff's claim for exemplary damages against the defendants failed. The second and third defendants had to be liable for their own conduct. Accordingly their claims for indemnity also failed (see p 62A–B).

[Bahasa Malaysia summary

Plaintif telah mendakwa defendan pertama atas perkara lain, tetapi kalah dan diperintah membayar cukai ditaksir sebanyak RM9,414.38 ('jumlah tersebut') kepada defendan pertama. Plaintif sendiri telah dipertuduh dengan kesalahan jenayah dan akibatnya Majlis Peguam enggan mengeluarkan Sijil Annual kepadanya untuk meneruskan amalan. Akibatnya, plaintif terpaksa menutup firma guamannya dan memberhentikan kakitangannya. Plaintif telah mengendalikan dua akaun anak guam — satu dengan Bank Buruh ('Bank tersebut') dan satu lagi dengan Bank of Commerce. Plaintif telah menutup akaun dengan Bank Buruh dan memindah semua wang kepada akaun dengan Bank of Commerce. Pada 9 Februari 1996, plaintif, dalam membuat keputusan untuk membayar jumlah tersebut dengan defendan pertama secara senyap, telah mengirim cek untuk jumlah tersebut dalam akaun Bank Buruh kepada firma defendan pertama. Menurut plaintif, semasa beliau masih menggaji kakitangannya, beliau sendiri tidak menulis cek. Dengan itu, apabila beliau terpaksa menulis cek untuk defendan pertama, beliau telah menggunakan

buku cek yang terletak di atas buku cek yang lain dan dengan perkataan-perkataan 'Akaun Anak Guam'. Oleh kerana perkataan-perkataan 'Akaun Ditutup' tidak diindorskan pada buku cek tersebut, beliau fikirkan adalah wajar untuk mengeluarkan cek tersebut dari akaun Bank Buruh. A

Pada 16 Februari 1996, plaintif menerima satu panggilan telefon dari Bank tersebut yang memaklumkan bahawa cek tersebut telah dikeluarkan dari akaun yang ditutup. Pada hari yang sama, beliau telah diberitahu oleh seorang bernama En Indran, seorang akauntan yang berkhidmat dengan firma defendan pertama bahawa ada masalah dengan cek tersebut. Pada hari yang sama, plaintif telah mengeluarkan cek ganti untuk jumlah yang sama, menulis sepucuk surat kepada En Indran, dan mencatatkan dalam surat tersebut bahawa 'cek yang lebih awal telah dikeluarkan daripada akaun yang salah disebabkan kesilapan kerani'. Surat tersebut telah difaks kepada firma defendan pertama pada hari yang sama dan En Indran bersetuju dengan cadangan plaintif bahawa ia boleh mengirim cek tersebut tanpa mengira bahawa suatu jangka masa cuti sedang menghampiri. Pada 28 Februari 1996, plaintif mengirim surat bertarikh 16 Februari 1996 dan cek ganti kepada defendan pertama yang diterima oleh firmanya pada 1 Mac 1996. Walau bagaimanapun, pada 2 Mac 1996 defendan pertama telah mengeluarkan pernyataan akhbar antara lain mendakwa: bahawa kelakuan plaintif dalam mengeluarkan cek yang tidak dilayan tersebut adalah bersamaan dengan jenayah yang serius di bawah s 420 Kanun Keseksaan; kelakuan plaintif adalah mengaibkan dan menyebabkannya tidak layak didaftar sebagai Peguambela dan Peguamcara di negara ini; dan negara ini tidak harus mengiktiraf plaintif dalam profesyen guaman. Defendan kedua telah menerbitkan kandungan pernyataan akhbar dalam *Sunday Star* pada 3 Mac 1996 manakala defendan ketiga telah menerbitkan suatu rencana mengenainya dalam *New Straits Times* pada 5 Mac 1996. Pada 4 Mac 1996, plaintif telah menelefon En Indran yang mengesahkan bahawa beliau telah memberitahu defendan pertama mengenai penjelasan plaintif tentang kesilapan cek yang dikirim tersebut dan penggantian berikutnya dengan cek yang sah. Plaintif berhujah bahawa kelakuan semua defendan telah menjejaskan pendirian profesional, keperibadian, kebolehpercayaan dan reputasi beliau dan juga mengakibatkan rasa benci dan penghinaan terhadapnya dan mendakwa antara lain untuk ganti rugi untuk fitnah. Defendan pertama membangkitkan isu-isu berikut dalam pembelaan dan penghujahannya, antara lain: (i) bahawa plaintif tidak sepatutnya berurus dengan En Indran kerana ia bukan seorang peguam; (ii) kata-kata sebenar yang dinyatakan dalam pernyataan akhbar tersebut yang tidak dikemukakan semula dalam suratkhabar ini adalah padah kepada kes plaintif; (iii) oleh kerana suatu terjemahan kata-kata tersebut dalam Bahasa Malaysia yang diakui sah tidak dikemukakan semasa perlangsungan prosiding, tuntutan plaintif harus ditolak; (iv) bahawa adalah perlu untuk beliau melaporkan kepada Majlis B C D E F G H I

Peguam dan pihak polis; (v) mahkamah harus menggunakan prinsip dalam s 114(g) Akta Keterangan 1950 dan membuat inferens bertentangan terhadap plaintif kerana gagal memanggil En Indran untuk memberi keterangan. Defendan kedua berhujah bahawa kata-kata yang diterbitkan dalam *Sunday Star* tidak mungkin mempunyai maksud yang memfitnah atau dalam apa-apa kes adalah kurang serius disebabkan ketiadaan perkataan 'menipu'. Defendan ketiga membangkitkan pembelaan justifikasi dan dalam penghujahan peguam berhujah bahawa kata-kata yang dipersoalkan mempunyai maksud yang berbeza. Defendan kedua dan ketiga juga menuntut tanggung rugi terhadap defendan pertama.

Diputuskan, membenarkan tuntutan plaintif:

(1) Mahkamah menerima penjelasan mengenai mengapakah plaintif telah mengeluarkan cek dari akaun anak guam Bank Buruh yang ditutup. Penjelasannya menunjukkan kesalahan yang tulen tanpa niat jahat untuk memperdayai atau menipu defendan pertama. Mengenai sama plaintif sepatutnya telah berurus dengan En Indran memandangkan En Indran bukan seorang peguam, ia hendaklah dianggap, dalam ketiadaan En Indran untuk memberi keterangan, bahawa beliau (En Indran) telah diberikuasa untuk berhubung dengan pihak yang mengeluarkan cek dan yang mana adalah dalam kedudukan yang seumpama plaintif. Selanjutnya oleh kerana plaintif digantung untuk sementara waktu dan bukan dalam amalan, plaintif bukanlah seorang peguam pada masa itu dan adalah mengikut aturan untuk plaintif berurus dengan En Indran (lihat ms 41B–D).

(2) Kata-kata yang diterbitkan dalam kedua-dua *Sunday Star* and *New Straits Times* dalam maksud asal dan biasa bermakna bahawa plaintif telah melakukan kesalahan jenayah menipu di bawah s 420 Kanun Keseksaan. Ia juga bermakna bahawa plaintif bukanlah orang yang layak dan wajar bertindak sebagai peguamcara dan bahawa Majlis Peguam seharusnya, berlandaskan alasan bahawa plaintif telah melakukan kesalahan jenayah demikian, membatalkan plaintif dari daftar sebagai seorang peguambela dan peguamcara. Dengan memanggil plaintif seorang penipu yang telah melakukan satu kesalahan di bawah s 420 Kanun Keseksaan, defendan-defendan jelas telah menuduh bahawa plaintif adalah penjenayah yang tidak layak memegang profesyen peguambela dan peguamcara. Pernyataan seperti yang diterbitkan akan merendahkan plaintif dalam pendapat ahli-ahli masyarakat yang berfikiran adil pada amnya atau menyebabkan beliau disingkir atau dielakkan atau untuk mendedahkan beliau kepada perasaan benci, penghinaan atau cemuhan. Adalah melampaui keraguan bahawa kata-kata tersebut memang memfitnah (lihat ms 41E–F, 42D, F).

(3) Penjelasan plaintif berhubung dengan kesilapan bona fide tidak dicabar dalam pemeriksaan balas oleh defendan-defendan

dan ia tidak juga dikemukakan kepada plaintif bahawa ia telah bertindak tanpa kejujuran. Undang-undang menganggap kepalsuan kata-kata yang dinyatakan dan beban terletak pada defendan-defendan untuk menangkis kepalsuan kata-kata yang dinyatakan. Beban terletak pada defendan-defendan untuk menangkis anggapan tersebut dan mereka tidak berbuat demikian. Dengan itu, tohmahan yang dibuat terhadap plaintif atas penipuan dan kelakuan yang mengaibkan adalah tidak benar (lihat ms 42G–43A).

(4) Defendan pertama memang berperasaan dengki. Keterangan plaintif bahawa En Indran telah memberitahunya bahawa beliau telah memaklumkan kepada defendan pertama bahawa cek pengganti telah pun diterima sebelum pernyataan akhbar tidak dipatah. Maka ia tidak dicabar bahawa defendan pertama memang sedar bahawa apabila beliau membuat pernyataan akhbar beliau tahu bahawa plaintif telah melakukan kesilapan yang tulen. Dalam aduannya kepada Lembaga Tatatertib, defendan pertama telah gagal melampirkan surat-menyurat yang menunjukkan ketulenan kesilapan plaintif. Bahkan dalam laporan polis, defendan pertama telah gagal menyebut banyak fakta material. Defendan pertama juga telah menahan fakta material ketika membuat pernyataan akhbar (lihat ms 43B–F).

(5) Kesan fitnah sebagaimana yang ternyata dalam pernyataan akhbar terkandung dalam kedua-dua terbitan. Tiada keraguan bahawa rencana suratkhabar membawa kata sebenar defendan pertama dan dalam beberapa misalan mengulangi kata-kata defendan pertama dalam bentuk ucapan secara tidak langsung. Tiada keperluan untuk melaporkan setiap perkataan defendan pertama dalam terbitan tersebut. Defendan pertama tidak mendakwa bahawa mana-mana bahagian ucapannya yang penting telah tertinggal dan beliau tidak juga mendakwa bahawa bahagian yang tertinggal akan mengubahsuai maksud bahagian itu yang dihujahkan oleh plaintif memfitnahnya. Plaintif tidak dikehendaki membukti bahawa apa yang didakwa dalam pernyataan tuntutan adalah tepat-tepat apa yang telah dikatakan oleh defendan. Adalah memadai sekiranya plaintif membuktikan bahawa kata-kata yang diucapi oleh defendan pada dasarnya sama dengan kata yang diplidkan dalam pernyataan tuntutan (lihat ms 43I–44B, G–H).

(6) Sekiranya defendan memberi pernyataan akhbar untuk terbitan, atau dalam jangkaan bahawa ia akan diterbitkan, ia akan bertanggungan atas versi yang diterbitkan semula biarpun ia adalah versi yang telah disunting. Berdasarkan fakta-fakta, defendan pertama bertanggungan sebagai penerbit fitnah dalam dua suratkhabar itu kerana beliau telah meminta, berusaha memperolehi atau membenarkan penerbitannya. Berlandaskan undang-undang mengenai terbitan semula, defendan pertama

bertanggungjawab atas laporan suratkhabar sepenuhnya seolah olah beliau sendiri telah menerbitkan laporan tersebut (lihat ms 44I–45A, F–G).

(7) Defendan pertama gagal melihat perbezaan di antara keperluan untuk terjemahan bulat-bulat dan terjemahan yang diakui sah. Dalam kes ini, plaintif memang telah menyediakan terjemahan bulat-bulat dalam Bahasa Malaysia dan andainya terjemahan demikian seperti yang dikemukakan oleh plaintif dipertikaikan, defendan pertama harus mengemukakan versi alternatif, yang gagal dilakukannya (lihat ms 46B-C).

(8) Defendan pertama telah bertindak melampaui apa yang dikehendaki darinya dan Kaedah-Kaedah Profesyen Guaman (Amalan dan Etika) 1978 ('Kaedah tersebut'). Walaupun defendan pertama betul dalam merujuk kepada Majlis Peguam, penjelasan plaintif akan menjustifikasikan ketidakperluan untuk merujuk hal tersebut kepada Majlis Peguam kerana kesilapan bona fide oleh seorang peguambela dan peguamcara tidak mungkin dijadikan dasar untuk mengambil tindakan tatatertib terhadapnya. Dalam kes ini, defendan pertama bukan sahaja telah merujuk plaintif kepada Majlis Peguam bahkan menuduh plaintif telah melakukan kesalahan jenayah menipu di bawah s 420 Kanun Keseksaan. Seterusnya, Kaedah tersebut tidak memberi-kuasa kepada plaintif untuk membuat pernyataan akhbar. Pernyataan akhbar yang dibuat dalam keupayaan defendan pertama sebagai seorang ahli politik membayangkan pertelingkahan kepentingan dan bagaikan mengguna bantuan politik supaya memperolehi kelebihan yang tidak adil ke atas plaintif. Pembuatan pernyataan akhbar dan penyeruan penerbitannya menunjukkan takat perasaan defendan pertama yang bersifat dengki dan mencaci (lihat ms 46F–H, 47B–C).

(9) Penghujahan defendan pertama mengenai inferens bertentangan terhadap plaintif tidak boleh diterima. Plaintif telah memberi keterangan bahawa En Indran telah menelefonnya terlebih dahulu dan telah mengesahkan perbualannya dengan En Indran secara bertulis, yang mana dokumen terletak dalam ikatan pliding. Plaintif tidak pernah diperiksa balas atas urusan yang berkaitan dengan En Indran. Justeru itu, setelah plaintif membuktikan urusan yang berkaitan dengan En Indran, beban mengalih kepada defendan pertama untuk memanggil En Indran, sekiranya beliau ingin mempertikaikan apa-apa keterangan (lihat ms 47D–E).

(10) Walaupun defendan kedua telah mengelak dari menggunakan perkataan 'menipu', ini sekadar tafsiran ilmu makna. Kata-kata yang diterbitkan bersangkutan plaintif oleh defendan kedua apabila diberikan makna biasa menyifatkan bahawa plaintif memang telah melakukan kesalahan jenayah menipu di bawah s 420 Kanun Keseksaan dan bahawa atas alasan ini beliau tidak

layak dan tidak wajar bertindak sebagai seorang peguam dan bahawa berdasarkan fakta ini Majlis Peguam seharusnya menyebabkan plaintif dibatalkan daripada daftar sebagai seorang peguambela dan peguamcara. Untuk memburukkan lagi fitnah, defendan kedua telah menggunakan perkataan 'ditendang' (bounced) — suatu istilah biasa yang lazim digunakan merendahkan pengeluar cek sebagai pihak yang tidak mempunyai apa-apa ketulusan kewangan (lihat ms 47G–48B).

(11) Defendan kedua tidak berhak membangkitkan pembelaan perlindungan bersyarat kerana pernyataan akhbar defendan pertama tidak dirangkumi oleh mana-mana kategori yang dirujuk dalam Bahagian 1 Jadual Akta Fitnah 1957. Unsur kepentingan awam yang merupakan suatu aspek pembelaan perlindungan bersyarat yang begitu mustahak langsung tidak wujud dalam kes ini. Defendan kedua telah gagal menilai perbezaan yang amat nyata dan penting di antara 'apa yang orang awam meminati' (that which the public is interested in) dan 'apa yang merupakan kepentingan awam' (that which is in the public interest). Kategori pertama bergantung pada sebahagian masyarakat awam dan pada mana mahkamah tidak akan memberi lindungan, manakala kategori kedua memelihara manfaat masyarakat awam dan pada mana mahkamah tentu akan memperluaskan perlindungan mereka (lihat ms 49C, E–F, H–I).

(12) Defendan dalam suatu guaman fitnah tidak semestinya perlu memberi maksud kepada kata-kata yang diadu. Namun begitu, sekiranya defendan mengutarakan justifikasi, ia mesti menunjukkan dalam pembelaannya sama ada sebagai penegasan khusus, atau dalam butir-butir yang digunakan, maksud yang ingin dijustifikasikan olehnya. Berdasarkan fakta-fakta, oleh kerana defendan ketiga tidak pun memohon kebenaran untuk meminda pembelaannya, ia memang menyerang plaintif secara tiba-tiba dengan menyifatkan kata-kata yang diadu, maksud yang berlainan dan dengan itu menyimpang secara radikal daripada pembelaan yang diplidkan. Di mana defendan memberikan maksud fitnah yang lain daripada apa yang dihujahkan oleh plaintif, dan cuba menjustifikasikan maksud berlainan demikian, ia mesti menyata-kan maksud yang ingin dijustifikasikan secara jelas (lihat ms 50E–F, 51B).

(13) Serangan defendan pertama ke atas keperibadian plaintif kononnya berlandaskan sabitan adalah suatu kesalahan yang amat serius. Defendan pertama tidak pun menegaskan di mana-mana dalam pliding bahawa ia cuba mengurangkan ganti rugi atas alasan bahawa plaintif adalah pelakon dalam video lucah. Namun demikian, walaupun plaintif telah dibebaskan atas kesalahan yang paling serius, defendan pertama gagal meminda plidingnya. Dalam ketiadaan apa-apa pemindaan, adalah tidak adil dan wajar untuk mahkamah menimbang keputusan Mahkamah Rayuan

yang lebih awal bahawa plaintif adalah seorang pelakon lelaki dalam video lucah. Andainya defendan-defendan berhasrat menurut keputusan Mahkamah Rayuan bahawa plaintif adalah pelakon dalam video lucah, biarpun tiada pemindaan telah dipohon, dengan kebenaran mahkamah defendan-defendan sepatutnya telah memohon untuk memeriksa balas plaintif atas tohmahan itu, dengan menunjukkan kepada mahkamah bahawa tujuan pemeriksaan balas adalah untuk mengurangkan ganti rugi (lihat ms 51H–52A, D–E).

(14) Defendan pertama cuba mengemukakan suatu petikan tertentu daripada penghakiman Mahkamah Rayuan sebagai keterangan dalam kes ini. Namun demikian, kewujudan penghakiman tersebut tidak merupakan suatu fakta yang dipersoalkan dalam kes ini. Pengemukaan suatu penghakiman yang lebih awal cuma membuktikan kewujudan keputusan yang dibuat terlebih dahulu dan tiada anggapan bahawa suatu penghakiman yang dibuat terlebih dahulu adalah keputusan yang betul tentang perkara tersebut. Tiada apa-apa dalam Akta Keterangan untuk mewajarkan kesimpulan bahawa pernyataan atau keputusan fakta dalam kes yang lain boleh digunakan sebagai keterangan dalam kes yang berikut untuk memutuskan pandangan yang dipersoalkan dalam kes berikut (lihat ms 53G, 54D, G–H).

(15) Sebarang keterangan berkaitan dengan keperibadian plaintif mestilah dihadkan kepada perkarangan tertentu kehidupan atau keperibadian beliau yang telah difitnah. Berdasarkan fakta-fakta, ia tidak boleh dikatakan bahawa fitnah yang didakwa mempunyai apa-apa kaitan dengan keputusan fakta yang dibuat oleh Mahkamah Rayuan berhubung dengan persembahan plaintif sebagai seorang pelakon lucah dalam suatu video (lihat ms 55H–I, 56A–B).

(16) Dalam menaksir ganti rugi pampasan dalam kes ini, Mahkamah Tinggi telah menimbang faktor-faktor berikut: (i) penderitaan dan kecederaan peribadi yang dialami oleh plaintif dan isterinya yang hamil; (ii) bahawa pendirian profesional plaintif telah terjejas; (iii) aduan defendan pertama kepada Majlis Peguam dan Lembaga Tatatertib; (iv) laporan polis defendan pertama; (v) pendirian sosial pihak yang terlibat; dan (vi) kegagalan melarat defendan kedua dan ketiga untuk menentusah sebelum penerbitan. Dengan mengambil kira segala faktor, plaintif harus diawardkan jumlah sebanyak RM250,000 sebagai ganti rugi pampasan terhadap defendan pertama. Berhubung dengan defendan kedua dan ketiga pula, plaintif harus diawardkan jumlah sebanyak RM100,000 terhadap setiap satu mereka (lihat ms 56H–58G).

(17) Dalam menaksir ganti rugi melampau (aggravated), mahkamah harus menimbang faktor-faktor berikut: (i) kelakuan defendan pertama; (ii) penindasan fakta-fakta material oleh defendan

pertama; (iii) pengulangan fitnah oleh defendan pertama; (iv) pendirian plaintif sebagai seorang peguam terjejas; (v) defendan pertama tidak menunjukkan sebarang kesalan atau membuat apa-apa permohonan maaf; (vi) kegagalan defendan kedua dan ketiga untuk menentusah sebelum penerbitan; (vi) keengganan defendan kedua dan ketiga untuk memberi sesalinan pernyataan akhbar defendan pertama kepada plaintif meskipun permintaan telah dibuat berulang kali; (vii) kegagalan defendan kedua dan ketiga untuk menerbitkan permohonan maaf. Setelah menimbang segala faktor, plaintif harus diberikan award jumlah sebanyak RM250,000 terhadap defendan pertama dan jumlah sebanyak RM100,000 terhadap defendan kedua dan ketiga setiap seseorang (lihat ms 58G–61C).

(18) Tuntutan plaintif untuk ganti rugi teladan terhadap defendan-defendan telah gagal. Defendan kedua dan ketiga harus bertanggungjawab atas kelakuan mereka. Oleh itu, tuntutan mereka untuk tanggung rugi juga gagal (lihat ms 62A–B).]

Notes

For cases on failure to call witness, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 116–129.

For a case on complaint against a solicitor, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1453.

For cases on libel in newspapers, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 792–798.

For cases on defamation generally, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 138–261.

Cases referred to

Abdullah Sani bin Hashim v Sharma Kumari Guaman Sivil No S2(S5)–23–08–1998(2) (refd)

Carson v John Fairfax & Sons Ltd (1993) 113 ALR 577 (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371 (refd)

DP Vijandran v PP [1999] 1 MLJ 385 (refd)

Gopalkrishna Gupthan v Ammalu Ammal AIR 1972 Ker 196 (refd)

Hassan & Anor v Wan Ishak [1961] MLJ 45 (refd)

Kumar Gopika Raman v Atal Singh AIR 1929 PC 99 (refd)

Lim Kit Siang v Datuk Dr Ling Leong Sik & Ors [1997] 5 MLJ 523 (refd)

MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun [1995] 2 MLJ 493 (refd)

Plato Films Ltd v Speidel [1961] 1 All ER 876 (refd)

PP v Tan Koon Swan [1987] 1 MLJ 18 (refd)

Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors [1999] 3 MLJ 529 (refd)

Sadasiba Panda v Bansidhar Sahu AIR 1962 Orissa 115 (refd)
Samrathmal v Emperor AIR 1932 Nagpur 158 (refd)
Syed Husin Ali v Sharikat Pencetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 (refd)
Workers' Party v Tay Boon Too [1975] 1 MLJ 47 (refd)
YK Fung Securities Sdn Bhd v James Capel [1997] 2 MLJ 621 (refd)

Legislation referred to

Defamation Act 1957 ss 12, 12(3)
Evidence Act 1950 ss 40, 41, 42, 43, 55, 114(g)
Legal Profession Act 1976 s 88A
Legal Profession (Practice and Etiquette) Rules 1978
Penal Code ss 193, 420
Rules of the High Court 1980 O 92 r 1

DP Vijandran (*K Raja Segaran, Hasnal Rezua Merican* and *CK Cham* with him) (*DP Vijandran & Associates*) for the plaintiff.
Karpal Singh (*M Manoharan* with him) (*Karpal Singh & Co*) for the first defendant.
Bhag Singh (*Bhag Sulaiman & Co*) for the second defendant.
Lorraine Cheah (*MK Yee* with him) (*Shearn Delamore & Co*) for the third defendant.

Cur Adv Vult

Kamalanathan Ratnam J

FACTS

The plaintiff and the first defendant are both leading lawyers in this country. The second defendant is the publisher and owner of *The Star* newspaper. The third defendant is the publisher and owner of the *New Straits Times*. There is no doubt that both these newspapers are the leading English dailies in this country with a large circulation. The acrimonious, long standing feud between the plaintiff and the first defendant goes back to their days as law students at the Singapore University. Soon after both had set up their respective legal practices, both entered Parliament. The plaintiff was elected as a Government Member of Parliament, whereas the first defendant was elected to Parliament as a member of the opposition. Even here they continued their running battle.

The plaintiff had sued the first defendant on another matter. The then Supreme Court having ruled in the first defendant's favour, the plaintiff was ordered to pay the taxed costs of RM9,414.38 which included the allocatur fees. On or about 5 February 1996 the plaintiff's solicitors, Messrs Murthi & Partners, faxed to the plaintiff the allocatur together with a letter from the first defendant indicating that since he had not responded to the first defendant's earlier demand notice, execution proceedings were being prepared due to the plaintiff's failure to settle the costs. Being dissatisfied with the conduct of his solicitor, Mr Murthi, who admitted to having

overlooked the matter, the plaintiff decided to take over the conduct of the matter and with this in mind he telephoned the office of Karpal Singh & Co on 9 February 1996 and spoke to Mr Manoharan, the legal assistant. He asked for time. When he finally received the file from Murthi & Partners he was out of time to apply for further review and decided to settle the sum quietly. He then sent a notice of change of solicitors and a Bank Buruh (Malaysia) Bhd ('the bank') cheque for the said sum. On the said letter he had written in his own handwriting as follows:

> Attn: Mr Manoharan
>
> The conversation (Mano/Vijandran) on 9 February 1996 refers.
>
> I tried to get in touch with you until 3.30 today.
>
> To be on the safe side, am sending the cheque by registered post straightaway. You will receive the same by Wednesday.
>
> Regards
> Sgd.

On 16 February 1996, the plaintiff received a phone call from the bank informing him that he had issued the cheque from an account that had been closed. The plaintiff had himself been charged for a criminal offence and as a result of this the Bar Council had refused to issue him a Sijil Annual to enable him to practise. This went on for about a year since January 1995. The plaintiff was compelled to close his law office and let his staff go. The plaintiff had operated two clients' accounts; one was with Bank Buruh (later converted to BSN Commercial Bank) and the other was with Bank of Commerce. The plaintiff had closed the account with Bank Buruh and had transferred all funds to the account with Bank of Commerce. When his staff was with him the plaintiff did not write the cheques. Therefore when he had to write the cheque for the first defendant, he used the cheque book that was lying on top of a bunch of cheque books and with the words 'Clients' Account'. Since the words 'Account Closed' were not endorsed on the cheque book he assumed it was alright to issue a cheque from the bank account.

He then was informed by one Mr Indran who was an accountant with Karpal Singh & Co that there was a problem with the cheque. On the same day he made out a replacement cheque from the Bank of Commerce clients' account for the same amount, addressed the letter to the attention of Mr Indran and indicated in the said letter that the earlier 'cheque was issued from the wrong account due to a clerical error'. The plaintiff requested Mr Indran to send his office boy to collect the said cheque. Mr Indran was unable to oblige and agreed to the plaintiff's proposal that he could post the said cheque notwithstanding the fact that a long stretch of holidays was imminent. The plaintiff faxed the letter on the 16th itself to the first defendant's firm. On 26 February 1996, when he returned from the holidays, the plaintiff telephoned the said Mr Indran who again was unable to send an office boy to collect the cheque. Therefore on 28 February 1996 the plaintiff posted the letter dated 16 February 1996 together with the cheque to the first defendant whose firm received the same on 1 March 1996.

A In the meantime, the first defendant had left for India on 14 February 1996 and returned to Malaysia on 28 February 1996. On 2 March 1996 the first defendant issued a press statement. The full text is reproduced herewith:

PRESS STATEMENT

B On 27 May 1992, the Supreme Court ordered DP Vijandran to pay me costs in relation to a defamation suit filed by him against me over my allegations against him for involvement in the pornographic tapes issue.

On 7 January 1994, the Deputy Registrar of the Federal Court ordered Vijandran to pay me RM9,414.36 as costs.

C On 12 February 1996, Vijandran sent my legal firm a Bank Buruh (Malaysia) Berhad client's account cheque for RM9,414.38. This cheque was dishonoured with the remark, 'Account Closed' when presented for payment (Xerox copy of the dishonoured cheque annexed herewith).

Vijandran's conduct in issuing a client's account cheque, which was subsequently dishonoured, amounts to a serious offence of cheating under s 420 of the Penal Code. His conduct is also dishonourable and renders him to D be a person unfit to be on the rolls of Advocates and Solicitors in the country. Will be lodging a police report against Vijandran so that the police can take appropriate action and also write to the Bar Council with a view to his being struck off the rolls. The country can ill-afford to have Vijandran in the legal profession. It would not be in the public interest and neither will it be in the interest of an honourable profession like the legal profession.

E Dated this second day of March 1996.

Sgd

Karpal Singh
Deputy Chairman, DAP, Malaysia
Member of Parliament, Malaysia

F The second defendant published the contents of the said press statement and I reproduce the full text of the statement as it appeared in the *Sunday Star* on 3 March 1996:

Vijandran's cheque dishonoured

G PETALING JAYA: A cheque sent by former Dewan Rakyat deputy speaker DP Vijandran to lawyer Karpal Singh bounced when the latter tried to cash it.

In a statement, Karpal Singh said Vijandran sent him the cheque for RM9,414.39 after he was ordered to pay costs by the Deputy Registrar of the Federal Court on Jan 7, 1994, over a defamation suit.

H Karpal Singh, who is also DAP deputy chairman, said Vijandran sent him the cheque for the amount on 12 Febuary.

Vijandran's conduct in issuing a cheque which was dishonoured is a serious offence under s 420 of the Penal Code.

'This action renders him to be a person unfit to be on the rolls of I Advocates and Solicitors in the country,' he said.

He added that he would lodge a police report against Vijandran and write to the Bar Council to complain about Vijandran's action.

The plaintiff then telephoned the said Mr Indran of the first defendant's firm on 4 March 1996 who confirmed that he had appraised the first defendant about the plaintiff's explanation of the wrong cheque being sent and the subsequent replacement with the valid cheque. On the same day, the plaintiff faxed a letter to the first defendant's firm confirming all that had transpired.

On 5 March 1996, the third defendant published an article in the *New Straits Times*. The entire article reads as follows:

> *Karpal files police report over cheque*
>
> KUALA LUMPUR, Mon — Member of Parliament Karpal Singh has lodged a report against lawyer DP Vijandran for issuing him a cheque for RM9,414.38 which was dishonoured.
>
> Karpal said Vijandran's conduct in issuing the cheque, which was subsequently dishonoured, amounted to cheating under s 420 of the Penal Code.
>
> The report was lodged at the Dang Wangi district police station at 1 pm today.
>
> Vijandran had sent Karpal a Bank Buruh (M) Bhd client's account cheque on Feb 12 which was dishonoured with the remark 'Account Closed' when presented for payment.
>
> Karpal said Vijandran's conduct rendered him unfit to be on the rolls of Advocates and Solicitors in the country.
>
> I will write to the Bar Council that he be struck off from the rolls.
>
> 'It will not be in the interest of the legal profession.'

THE PLAINTIFF'S CLAIM

Contending that the conduct of all the defendants had gravely injured him in his professional standing, character, credit and reputation and that he had been brought into public scandal, odium and contempt the plaintiff prayed for:

(1) damages for libel, including aggravated and exemplary damages;

(2) an injunction to restrain the defendants whether by themselves, their servants or agents or otherwise howsoever from further publishing the said or any similar words defamatory of the plaintiff; and

(3) costs.

FINDING OF THE COURT

Whilst the plaintiff testified and made serious allegations against the first defendant, it was rather surprising that Mr Karpal Singh failed to take the stand to speak up in his defence. Instead he let his legal assistant, Mr M Manoharan, to do the talking. But more on this later.

The cheque from the closed account

I accept the explanation of the plaintiff as to why he issued the cheque from the Bank Buruh (M) Bhd clients' account which was closed. The plaintiff's

explanation is a simple one. The error lay in either failing to return the cheque book to the bank after the account was closed or in failing to endorse on the cheque book the words 'Account Closed'. In any case, knowing the abyssal void separating these two protagonists, it would be preposterous to even imagine that the plaintiff would have dared to deliberately issue the first defendant a cheque from a closed account. Mr Vijandran would have been walking into the lion's den blindfolded and backwards, if he had done just that. I therefore accept his explanation as a genuine mistake with no ill-intention to mislead or deceive Mr Karpal Singh or to cheat him. In any case, no sooner had he discovered the error, the plaintiff had immediately issued a fresh cheque from an existing clients' account. Although the said cheque was posted a few days later, yet the plaintiff had the assurance of Mr Indran that it was all right for the former to send the cheque after the long holidays. A point I have to consider at this stage is whether the plaintiff ought to have dealt with Mr Indran at all, since the latter was not a lawyer. This was the issue raised by Mr Karpal in his submission. The answer is simple as it is straight forward. It was Mr Indran who called the plaintiff first and the plaintiff responded. I must therefore assume, in the absence of Mr Indran testifying, that he had the first defendant's authority to communicate with parties issuing cheques and who are in a similar situation as the plaintiff was. Further, the plaintiff was suspended and not in practice. For all practical purposes, the plaintiff was then not a lawyer and it is my judgment that it was in order for the plaintiff to have dealt with Mr Indran.

Whether the words published are defamatory?

There is no doubt in my mind that the words as published in both the *Sunday Star* and in the *New Straits Times* are defamatory of the plaintiff. The words in their natural and ordinary meaning meant that the plaintiff had committed the criminal offence of cheating under s 420 of the Penal Code. It also meant that the plaintiff was not a fit and proper person to act as a solicitor and that the Bar Council ought to, on the basis that the plaintiff had committed such a criminal offence, strike the plaintiff off the rolls as an advocate and solicitor. I can do no better than repeat the words of Gopal Sri Ram JCA in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 374:

> It cannot, I think, be doubted that the first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published.

His Lordship continued:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory (see *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334.)

Continuing further his Lordship said at p 375:

> ... I think that there can be no doubt that to say of a man that he is a cheat and a liar is a serious defamation of him. It has the effect of lowering the appellant in the estimation of right-thinking members of society generally.

In *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529, I held that the test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one in that it must be given a meaning in which a reasonable man would understand it and that for this purpose it is necessary to consider the whole article. I would adopt that same objective test to this case and I therefore find that the words published are clearly capable of the defamatory meanings as set out by the plaintiff. The next stage that the court should embark upon after having decided that the words complained of are capable of bearing a defamatory meaning is to ascertain whether the words complained of are in fact defamatory. (See *Chok Foo Choo*.) This aspect is easy to decide as it revolves upon a question of fact dependent upon the peculiar circumstances of each particular case. As I said this issue is settled. By calling the plaintiff a cheat as having committed an offence under s 420 of the Penal Code the defendants have clearly imputed that the plaintiff is a criminal who is unfit to hold the profession of an advocate and solicitor. In *Syed Husin Ali v Sharikat Pencetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56, Mohamed Azmi J (as he then was) said at p 58:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

Such statements as published would no doubt, in my view, tend to lower the plaintiff in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule. To my mind it is clearly beyond doubt that the words are in fact defamatory.

The falsity of the allegation

None of the defendants led any evidence that the plaintiff was acting dishonestly when he issued the cheque from the clients' account. On the other hand, there is unrebutted evidence that there was a bona fide error and that there was no ill-intention on the part of the plaintiff. In fact, the plaintiff's explanation relating to the bona fide error was not challenged in cross-examination by the defendants; neither was it even put to him that he had acted dishonestly. It is therefore obvious that the defendants' counsel, knowledgeable in the law as they are, knew that if they were to put to the plaintiff any allegation of dishonesty, they would have to adduce evidence in support, which evidence they obviously did not have. In any case, I must remind myself that the law presumes the falsity of the words stated and

A that the onus is on the defendants to rebut the said presumption and obviously they have not done so. I therefore find that the allegations made against the plaintiff of cheating and of dishonourable conduct are absolutely false.

B *Malice*

There is no doubt in my mind that this whole unfortunate episode occurred because of actual malice on the part of the first defendant. As I had found earlier, the plaintiff and the first defendant had led a life of animosity and antagonism towards each other. The plaintiff's evidence that Mr Indran had informed him that he had informed the first defendant that the replacement C cheque had already been received prior to the press statement, was unrebutted. It stands unchallenged therefore that the first defendant was well aware that when he made the press statement he knew that there was a genuine error on the part of the plaintiff. But alas, the first defendant, who to my mind is one of the ablest advocates of this country with an acute and D perceptive mind, became blinded with the fury of rage and anger. The first defendant seized the opportunity to belittle the plaintiff with the press statement. The motive was clear. The first defendant intended to malign the plaintiff and to finish his career. There is clear evidence that the first defendant had at one press interview openly declared that '... either he (referring to the plaintiff) is finished or I am finished'. There are so many E other instances of malice. The first defendant filed a complaint with the Disciplinary Board against the plaintiff. In the said complaint the first defendant completely omitted to enclose the correspondences which would show the genuineness of the plaintiff's error in sending the cheque from a closed clients' account. Even in his police report made on 4 March 1996 the first defendant had clearly omitted to mention many material facts. Whilst F I have warned myself that a police report ought not to be a complete narrative of all events, having perused the said report, I find that many material facts have been omitted. Even when he made the press statement the first defendant suppressed material facts such as the correspondences between the plaintiff and his firm and the contrite and apologetic letter of the plaintiff when enclosing the subsequent cheque. The first defendant G wrote to the police and to the Bar to expedite their investigations against the plaintiff. When he received a reply from the Bar Council stating that his complaint was not appropriate for action to be taken by them under the Legal Profession Act 1976, he did not make this public. The second and third defendants gave no explanation as to why they refused to give the H plaintiff a copy of the press statement.

CASE OF THE FIRST DEFENDANT

The main thrust of the first defendant's defence is that the actual words as stated in his press statement have not been reproduced in the two I newspaper articles and this he contends is fatal to the plaintiff's case. To my mind the sting of the libel as stated in the press statement is contained in both the publications. In any case there is no doubt that the newspaper

articles carried the actual words of the first defendant and in some areas repeated the first defendant's words in the form of indirect speech. It is my judgment that there is no requirement that every word of the first defendant has to be reported in the publications. The first defendant does not allege that any significant part of his statement has been left out; nor does he allege that the part left out, if any, would vary the meaning of the part, the plaintiff contends is defamatory of him. The first defendant's case is that if any part is left out that is fatal and for this the first defendant relies upon the decision in *Lim Kit Siang v Datuk Dr Ling Leong Sik & Ors* [1997] 5 MLJ 523. I have perused the said judgment and am unable to find support for the first defendant's argument that everything the defendant said must be set out verbatim. The said case in my view supports the proposition that the words in the statement of claim should be the words exactly used by the defendant. In any case it is unfortunate that a very old decision of the Federal Court, namely, the case of *Hassan & Anor v Wan Ishak* [1961] MLJ 45 was not brought to the attention of the court in *Lim Kit Siang*. In *Hassan & Anor* the Federal Court said at p 45:

> ... the defendants have now appealed and their appeal is based on the single highly technical point that the precise words of the alleged slander as proved at the trial were not set out in the statement of claim.

His Lordship Thomson CJ continued at p 46:

> But although in my view the actual words used in the language in which they were used should have been pleaded the failure to do so cannot be held to have been fatal to the case of the respondents.
>
> It is true that in the case of *Bradlaugh v The Queen* 3 QBD 607 it was held that in an indictment for publishing an obscene book it is not sufficient to describe the book as obscene but that the actual words alleged to be obscene must be set out and if they are omitted the failure to set them out will not be cured by a verdict of guilty.
>
> There is no question that that case so far as it goes must be followed. It does not, however, follow from that case that in order to succeed the plaintiff must prove up to the hilt every word of the defamatory utterance as set out in his statement of claim. It is sufficient if he proves the substance of it.

A plaintiff pleads in his statement of claim certain words which he alleges the defendant said. At the trial, he has to adduce proof of these words. However, at the trial, the plaintiff is not required to prove that what is alleged in the statement of claim is exactly what the defendant said. It is sufficient if he proves that the words said by the defendant are substantially the same as those pleaded in the statement of claim.

The republication

When a newspaper reports a press statement by an individual, it is said to republish the said press statement. The original press statement is the publication and the report of the newspapers is republication. If a defendant gives a press statement for publication, or in the expectation that it would be published, he becomes responsible for the republished version even if it

A is an edited version (see *Gatley on Libel and Slander* (9th Ed) paras 6.31 and 6.32.) In fact, *Carter-Ruck on Libel and Slander* (3rd Ed) states at pp 59–60 as follows:

> The original publisher of a libel is liable for its repetition if he authorised republication, or if republication was the natural and probable consequence
B of the original publication, or if the person to whom the original publication was made was under a moral duty to republish the words to a third person. If a man gives an interview to press reporters intending that the substance of the interview, during the course of which he makes defamatory statements, should be published in their respective newspapers, and the newspapers publish those statements, not necessarily in precisely the same words but adhering to the
C sense and substance of them, the individual making them will be liable not merely for slander in publishing them to the reporter but for libel in that he authorised the publication which subsequently was made in the newspaper itself.

Here the first defendant released to the second and third defendants his press statement which was clearly defamatory of the plaintiff. The second
D and third defendants published the matters contained therein adhering to the sense and substance of it, although modifying the context by using language of their own. Yet the first defendant cannot escape culpability. Unfortunately for the first defendant he elected not to testify on his own behalf. In the circumstances, no evidence was led as to the manner in which
E he issued the press statement. However, the first defendant has not denied making the press statement nor has he denied giving the second and third defendants the said statement. I have no doubt in my mind that the first defendant made the press statement with the express intention and expectation that his statement would be published. There is no evidence as to whether he had made any reservations or entered any caveats in respect
F of the publication. I would not know if he had directed the second and third defendants to publish his statement fully. In the circumstances, it is my finding that the first defendant is liable as the publisher of the libel in the two newspapers since he 'requested, procured or authorized the publication' (see 28 *Halsbury's Laws of England* (4th Ed) para 70.) Therefore, on the basis of the law relating to republication, the first
G defendant is responsible for the newspaper reports as fully as if he himself had published the said reports.

Absence of certified translation in Bahasa

H The first defendant takes the point that since a certified translation of the impugned words in Bahasa Malaysia has not been tendered in the course of the proceedings, the plaintiff's claim should be dismissed. For this proposition the first defendant relied on *Lim Kit Siang* where the learned Judicial Commissioner (as she then was) said at p 526 as follows:

> I The authorities are manifest in their approach that it is fundamental that the exact words as uttered (by the first defendant in this case) must be reproduced in the original language with a certified translation in the language of the court, in the absence of which the claim will fail.

With respect, although the learned Judicial Commissioner had stated that the authorities are manifest for this proposition, unfortunately no cases were cited and Mr Vijandran assures the court in his submission that he has been unable 'to unearth any authorities that require a certified translation'. The first defendant's further reliance on *Workers' Party v Tay Boon Too* [1975] 1 MLJ 47 is also flawed. Chua J in his judgment said that if the slander alleged is in a language other than in English it must be set out in the statement of claim in the foreign language precisely as spoken and followed by a literal translation. He held that it was not enough to set out a translation without setting out the original or vice versa. Obviously the first defendant has failed to see the distinction between the requirement of a literal translation and a certified translation. In the case before me, the plaintiff has indeed provided a literal translation in Bahasa Malaysia and if such a literal translation as provided by the plaintiff is in dispute, it was open to the first defendant to have provided the court with his alternate version, which he failed to do. In any case, the proviso to O 92 r 1 of the Rules of the High Court 1980 states:

> Provided that any document in the English Language may be used as an exhibit, with or without a translation thereof in the national language.

I therefore hold that the issue relating to the absence of a certified translation in Bahasa Malaysia is without merit.

Justification

The first defendant pleaded justification but led no evidence. In fact, in his submission, the first defendant argued that it was necessary to report to the Bar and to the police. He relied upon a ruling of the Bar Council which came into effect as of 1 October 1993 and which required an advocate and solicitor receiving a clients' account cheque from another advocate and solicitor and which said cheque has been dishonoured, to report the same to the Bar Council and that if he failed to do so, he himself would be guilty of misconduct. That may be so. But the first defendant went beyond what was required of him. He was right to refer to the Bar Council to play safe although I would have thought that the explanation of the plaintiff would have justified not having to refer the matter to the Bar Council. In fact, the Bar Council agreed that there was no case against the plaintiff in respect of the first defendant's complaint. I should think that a bona fide error by an advocate and solicitor can never be the basis for disciplinary action against him. In any case, not only did the first defendant refer the plaintiff to the Bar Council, he accused the plaintiff of committing a criminal offence of cheating under s 420 of the Penal Code. In this case the first defendant went beyond the requirement of the Legal Profession (Practice and Etiquette) Rules 1978. The said rules do not authorize him to give a press statement. But it is important to note that the first defendant gave the press statement and signed it as 'Deputy Chairman, DAP, Malaysia, Member of Parliament, Malaysia'.

Conflict of interest

It seems to be the practice of advocates and solicitors who happen to be Members of Parliament to inter-relate both their job as an advocate and solicitor with their elected office. The case before me is a typical example where the first defendant ought to have kept both vocations in their respective spheres. As a lawyer he felt cheated by the conduct of the plaintiff although such a notion has since been shown to be totally misconceived. However, the press statement was made in the capacity of a politician. Where the first defendant himself is the complainant, it seems to me that the conduct of the first defendant clearly reflected a conflict of interest. He was, to my mind, using political mileage to gain an unfair advantage over the plaintiff. Since he felt justified in lodging a complaint with the Bar Council and a report with the police, he should have stopped at that. The making of a press statement and calling for its publication showed the extent of the malicious and vituperative intention of the first defendant.

Section 114(g) of the Evidence Act 1950

The first defendant argued that this court ought to invoke the principle set out in s 114(g) of the Evidence Act 1950 and draw an adverse inference against the plaintiff for failing to call Mr Indran to testify. This submission is unacceptable. The plaintiff had testified that it was Mr Indran who first telephoned him. The plaintiff had confirmed his conversation with Mr Indran in writing and this document is in the agreed and admitted bundle of documents ('CABD'). Further, the plaintiff was never cross-examined on these matters relating to Mr Indran. In the circumstances, I am satisfied that the plaintiff, having proved the matters relating to Mr Indran, the onus had shifted to the first defendant to call Mr Indran, if he intended to dispute any of the evidence. Taking all matters into consideration, I am satisfied that the plaintiff has proved his case against the first defendant.

CASE OF THE SECOND DEFENDANT

The second defendant contended that the impugned words as published in the *Sunday Star* are not capable of having a defamatory meaning as alleged by the plaintiff or in any case the publication is less serious because of the absence of the word 'cheat'.

Whilst I agree that the second defendant had scrupulously avoided the use of the word 'cheat', but that to my mind is a matter of semantics. The very fact the second defendant had published the words stating that 'issuing a cheque which was dishonoured is a serious offence under s 420 of the Penal Code', is sufficient. Section 420 is the relevant section that deals with the offence of cheating. I am satisfied that the words published of the plaintiff by the second defendant when given their ordinary meaning implied that the plaintiff had indeed committed the criminal offence of cheating under s 420 of the Penal Code and that for this reason he was not a fit and proper person to act as a lawyer and that based on this fact the Bar Council ought to cause the plaintiff to be struck off the rolls as an advocate

and solicitor. Whether the world at large ought to know the implication of the reference to s 420 of the Penal Code is not the issue. So long as members of the plaintiff's fraternity including those of the judicial service know the meaning attributed to s 420, is sufficient. In any case, even if the general public is unaware of the charge in respect of s 420 of the Penal Code, the very fact that there is reference to 'a serious offence under the Penal Code' it is sufficient to impute the meaning the plaintiff contends ought to be given. To compound the libel, the second defendant used the word 'bounced'. The use of the word 'bounced' connotes the rubberized effect of issuing cheques with the intention to cheat when there is no money in the account. It is a commonly used term, usually denigrating the issuer of such a cheque as one devoid of any financial integrity.

Qualified privilege

To consider if the second defendant is in fact entitled to raise this defence, it is necessary to reproduce s 12 of the Defamation Act 1957 relating to 'Qualified privilege of newspapers' and the Schedule Pt I.

Section 12:

> Qualified privilege of newspapers
>
> (1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.
>
> (2) In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.
>
> (3) Nothing in this section shall be construed as protecting the publication of any blasphemous, seditious or indecent matter or of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.
>
> (4) Nothing in this section shall be construed as limiting or abridging any privilege subsisting (otherwise than by virtue of the Libel Enactment of the Federated Malay States and the Libel Ordinance of the Straits Settlements repealed by this Act) immediately before the commencement of this Act.

Schedule Part I:

> Schedule
> PART I
> (Section 12(1))
>
> A fair and accurate report of proceedings —
>
> (a) of the legislature of any part of the Commonwealth other than in Malaysia;

A (b) of an international organisation of which Malaysia or the Government thereof is a member;

(c) of an international conference to which the Government sends a representative;

(d) before any court exercising jurisdiction throughout any part of the Commonwealth (as defined in the Constitution) outside Malaysia or a court martial held outside Malaysia under any written law in force in Malaysia or under any Act of the United Kingdom Parliament; and

(e) of a body or person appointed to hold a public enquiry by the Government of Malaysia or any State thereof or by the legislature of any part of the Commonwealth outside Malaysia.

C It is obvious, therefore, that the press statement issued by the first defendant does not fall into any of the categories referred to in Pt I of the said Schedule and thus, not entitled to the defence of qualified privilege.

Whilst it is not necessary for me to consider the common law aspect of qualified privilege since statutory law now prevails, yet I must state that D even under common law, the defence of qualified privilege is not available to newspapers who publish to the world at large. This rule of law is very succinctly set out in *Gatley on Libel and Slander* (9th Ed) at para 14.81. It reads as follows:

> Since the fundamental principle is that a statement is protected by privilege E only if the publication of it is to persons who have a proper interest or duty in the matter with which it is concerned, the protection is rarely available for publication in the mass media, for the public as a whole will not have the relevant interest or duty.

The element of public interest as a defamation concept which is a quintessential aspect of the defence of qualified privilege, is completely non F existent in this case. In any case, the second defendant did not even plead public interest.

It is necessary to reproduce paras 8 and 9 of the second defendant's defence for clarity of reasoning:

G (8) Further in the alternative the second defendant states that the plaintiff is a former political figure and the first defendant is also a political figure from a different political party and the statement by the first defendant was made in context of the continuing conflict and dispute and therefore readers have an interest to know about it.

(9) Therefore, the second defendant states that the said statement was H published in circumstances where the second defendant is entitled to Qualified Privilege.

To my mind, the second defendant has fallen prey to a popular fallacy. It has failed to appreciate the fact that there is a real and a very important distinction between 'that which the public is interested in' and 'that which is in the public interest'. Needless to say the first panders to the draw of the I public and certainly the courts would not lend their protection to such exercises. The second caters for that which is for the benefit of the public and the courts would certainly extend their protection. This subtle yet

subsisting distinction is found in s 12(3) of the Defamation Act 1957, which reads as follows:

> (3) Nothing in this section shall be construed as protecting the publication of any blasphemous, seditious or indecent matter or of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.

Clearly from the pleadings the second defendant intended to pander to the taste of the public as the defence suggests that the public would be interested in the dispute between the plaintiff and the first defendant. The second defendant is thus precluded now from raising the concept of public interest to support its defence of qualified privilege. I am satisfied that the plaintiff has indeed proved his case against the second defendant.

CASE OF THE THIRD DEFENDANT

In its defence the third defendant pleaded justification of the defamatory imputation as pleaded by the plaintiff. In other words, the third defendant contended that it would justify the meaning intended by the plaintiff that he had committed the criminal offence of cheating under s 420 of the Penal Code. However, in its submission, the third defendant has argued that the impugned words have a different meaning. Mr Vijandran argues vociferously that the third defendant cannot depart radically from its pleadings by attempting to justify the new meaning it intends. I have already, in dealing with the case against the first defendant, dealt with the need to stick to one's pleadings. To my mind, a defendant in a defamation suit need not necessarily give a meaning to the words complained of. However, if the said defendant pleads justification, then he must show in his defence, either as a specific averment, or in the particulars relied on, the meaning he seeks to justify. Since the third defendant did not even seek leave to amend its defence I hold that it is certainly taking the plaintiff by surprise to ascribe to the words complained of, a different meaning and to thus depart radically from its pleaded defence.

The alleged different meaning

Having ruled that the third defendant cannot now rely on the alleged different meaning, it is necessary for me to consider and rule on this issue even assuming I was wrong in my earlier view. Essentially, the third defendant is saying that the article merely stated that the plaintiff is only being accused of being unfit to be a solicitor and that he was not actually struck off.

I find this new twist to the pleadings, that the report in the *New Straits Times* only accused the plaintiff, an afterthought. In any case, there was not even an application made with a view to amend the defence, to include this new twist. In so far as the press statement goes, it clearly and unequivocally states that the plaintiff has committed the serious offence of cheating pursuant to s 420 of the Penal Code and that he should be struck off the

rolls. It was the case of the third defendant that since the third defendant had stated that a police report had been lodged by the first defendant, the ordinary man in the street would only see it as an accusation. This I agree, and I would add that the ordinary reasonable man in the street would consider the filing of a police report by a well-known and prominent criminal lawyer such as the first defendant, as adding credence to the imputations inferred in the said newspaper report. Where a defendant sets up a defamatory meaning different from that contended by the plaintiff, and seeks to justify such different meaning, he must in my view clearly and unequivocally state the meaning he seeks to justify. I find that the plaintiff has indeed proved his case against the third defendant.

DAMAGES

The plaintiff has premised his claim for damages on the basis that his financial integrity has been gravely affected. There is no doubt that he who receives the blow will feel the pain, and in so far as the offender is concerned, I draw to mind a Shakespearean line which reads, 'He jests at scars who has never felt a wound'.

The moral integrity of the plaintiff

However, the first defendant, during his own cross-examination of the plaintiff, referred the latter to a case where the plaintiff was charged for a criminal offence under s 193 of the Penal Code and convicted and sentenced to a term of imprisonment of one month and a fine of RM2,000 or in default a term of imprisonment of two weeks. He successfully appealed against the said conviction and sentence. In a reported judgment, *DP Vijandran v PP* [1999] 1 MLJ 385 (CA), the Court of Appeal made a finding that the plaintiff herein was the male actor in a pornographic video tape tendered in evidence.

Not pleaded

It is set law that if the first defendant intends to raise the character of the plaintiff as affecting damages he has to plead the same so as to put the plaintiff on notice. The first defendant has raised the question of the plaintiff's character in para 21(ii) of his defence only as follows:

> It is further pleaded the plaintiff has no standing, character or credit or reputation which is capable of being brought into public scandal, odium and contempt, as the plaintiff has been *convicted of a most serious offence.* (Emphasis added.)

Clearly the attack upon the plaintiff's character was based on his alleged conviction 'of a most serious offence'. Nowhere in the pleadings has the first defendant averred that he seeks to mitigate damages on the ground that the plaintiff was an actor in a pornographic video. However, the plaintiff was acquitted of this 'most serious charge' (see *DP Vijandran v Public Prosecutor*). There is therefore no conviction as pleaded, resting against the plaintiff. Even at submission stage the first defendant failed to apply to

amend his pleadings. This to me is indicative of a mind so convinced of the plaintiff's guilt that not even the pronouncement of the Court of Appeal acquitting the plaintiff of the offence, was sufficient to erase the focus. As I said, parties are bound by their pleadings and in the absence of any amendment it is not just and proper for me to consider in this case, the finding of the Court of Appeal concerning the plaintiff's acting talent.

Are the contents of a law report evidence per se?

Whilst I am in agreement with the plaintiff in his submission that there is no provision in the Evidence Act which provides that a report of a case or the facts as stated in a case as reported in any law report can be evidence before a court, I cannot accept the plaintiff's argument that such a report has to be tendered only through the registrar of a particular court by producing a certified true copy of the said judgment. This submission makes a mockery of the law of precedent. If each time a lawyer refers a case to court, he has to call the registrar to prove the contents of the report, it would mean that the wheels of justice would be bogged down in the quick-sand of confusion and law and logic would be delivered to litigants borne upon the back of a slow moving armadillo. That cannot be.

Whilst the report and the matters stated therein stand towards the test of time, if the first defendant or any of the defendants had intended to pursue the finding of the Court of Appeal that the plaintiff was the actor in the pornographic video, then even if no amendment had been applied for, the defendants could have with leave of the court applied to cross-examine the plaintiff on that allegation, indicating to the court that the purpose of the cross-examination would be to mitigate damages. The plaintiff ought to have been given the opportunity to explain. He cannot be condemned in this court upon a finding by another court without he being given the opportunity to either explain himself or to inculpate himself. In fact, it is appropriate to quote a passage from Dr B Malik's *Practical Hints on Cross-Examination* (3rd Ed, 1991). This is what he said at p 715:

> In actions for defamation, it is always legitimate to attack the character of the plaintiff, whether or not he becomes a witness in his own behalf. This question in such cases is one of sound tactics rather than of professional ethics. The plaintiff's character is directly material on the issue as to how much he has been damaged by what the defendant has said or written of him. Hence, the manner in which he may be handled by opposing counsel is to be clearly distinguished from pure cross-examination to credit.

Clearly the defendants ought to have pursued with their cross-examination on this aspect with the plaintiff. In the circumstances, for the purposes of the action before me I will have to disregard the comments of the Court of Appeal with regard to the plaintiff's character. In any case, I am fortunate to be able to fortify my decision by relying upon a decision of the Court of Appeal in *YK Fung Securities Sdn Bhd v James Capel* [1997] 2 MLJ 621. This was a case of a breach of contract. The backdrop of the case was the collapse of Pan-Electric Industries Ltd and the related activities of one Tan Koon Swan and his associates. The said Tan Koon Swan did not give

A evidence. A law report *Public Prosecutor v Tan Koon Swan* referring to a criminal action against the said Tan Koon Swan was referred to. The Court of Appeal clearly stated that the report was not evidence before the court. Mahadev Shankar JCA said as follows at p 646:

> B (Tan Koon Swan was convicted by the Singapore High Court on 26 August 1986 and sentenced to two years' imprisonment — see *PP v Tan Koon Swan* [1987] 1 MLJ 18. We will revert to the relevance, if any, of this report at the appropriate juncture later.)

and at p 664:

> C We must also state that the facts set out in the case report of *PP v Tan Koon Swan* [1987] 1 MLJ 18 and the 'statement of facts' to which Tan Kok Liang may have admitted to in the trial in which he was also convicted in Singapore are emphatically not evidence in this trial. The document (ID 27) — if it had been admitted and to the limited extent that it contained previous statements as to facts within Tan Kok Liang's own knowledge — could only be used to show consistency or to contradict his testimony in this trial (ss 145 and 157 of the Evidence Act 1950). In point of fact, ID 27 damaged Tan Kok Liang's D credibility because nowhere in the document is there any suggestion that James Capel was in any way privy to the conspiracy between him and Tan Koon Swan to use S$59.5m of Pan-Electric's funds to pay for the purchase of Tan Koon Swan's shares. If the defence regarded any of the facts in these documents as relevant, they had to be independently proved in the court below.

E The sections in the Evidence Act dealing with judgments in other suits are ss 40, 41, 42 and 43. Clearly ss 40–42 are inapplicable to the case before me. Can it be argued that the statement as contained in the judgment of the Court of Appeal relating to the plaintiff being the actor in the pornographic tape be admissible under s 43 of the Evidence Act? The said s 43 reads as F follows:

> 43 Judgments, etc other than those mentioned in ss 40 to 42 when relevant
>
> Judgments, orders or decrees other than those mentioned in ss 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.

G There is no doubt that the existence of the judgment of the Court of Appeal is not a fact in issue in this case. Admittedly what the first defendant is seeking to do is to admit a certain passage from the judgment of the Court of Appeal as evidence in this case. It is clear that established authorities are totally against the first defendant on this score. *Sarkar on Evidence* (15th Ed) Vol I states at p 839 para 2 as follows:

H

> The object behind enacting s 43 appears to be two fold: (1) to treat every case a class by itself so that the judgment delivered in one case may not be availed of by parties to another case; and (2) to maintain the independence of courts by preventing the parties from submitting before the court hearing their case the judgments of other courts.

I Again at p 839 para 4:

> There is no provision in the Act by which the actual decision or the findings arrived at in a previous judgment can be used as evidence to decide the points

> which are in issue in a particular case. Such a decision may operate as res judicata or be relevant under ss 40-42 to prove assertion of a right, but otherwise it is no better than a mere opinion expressed on the issues in a particular case and opinion is relevant in those cases only in which it is specially referred in the Act and in no others [*Purnima v Nandlal* PLT 582; *Ramparekha v Ramjhari* AIR 1933 P 690; *Hitendra v Rameswar* AIR 1925 P 625]. Statements of facts in a previous judgment is not admissible under s 43 in a subsequent case to decide any points in issue [*Khubnarain v Ram Ch* AIR 1951 P 340].

Almost 70 years ago, the Privy Council had occasion to consider this issue. This is what his Lordship Sir John Wallis had to say at p 102 of *Kumar Gopika Raman v Atal Singh* AIR 1929 PC 99:

> ... The Indian Evidence Act does not make finding of fact arrived at on the evidence before the court in one case evidence of that fact in another case.

From this case and the numerous authorities cited it seems to me the law that the production of a previous judgment merely establishes the existence of a prior decision. There is no presumption that a prior judgment is the correct decision on the matter. What the law of res judicata establishes is that one cannot go behind the decision in certain similar factual cases based on the ground of public policy. In *Gopalkrishna Gupthan v Ammalu Ammal* AIR 1972 Ker 196, Narayana Pillai J said at p 197:

> ... Judgments not coming under ss 40 to 42 are not relevant at all in respect of opinion expressed therein. They can amount only to opinion evidence and opinion evidence is generally inadmissible. Such opinion evidence is, however, admitted under s 45 of the Evidence Act when the court has to form an opinion upon a point of foreign law, or of science or art or as to identity of handwriting but in such cases it is the duty of the court to scrutinise the soundness or validity of opinion evidence exercising its own independent judgment. In the case of a previous judgment such scrutiny is impossible because the court trying the subsequent case cannot reopen the case and hear it on the merits as if the court is hearing an appeal or is retrying the previous case on fresh evidence. The court in the subsequent case has to decide it on the materials before it exercising its own independent judgment. Therefore my conclusion is that judgments qua judgments and as expression of opinion of the courts which pronounce them are not relevant at all except under ss 40 to 42 of the Evidence Act.

I agree and accept the views of the learned judge. I am therefore compelled to conclude that there is nothing in the Evidence Act to warrant the conclusion that the statements or findings of facts in another case can be used as evidence in a subsequent case to decide the points which are in issue in the subsequent case.

Is evidence of a particular act, evidence of reputation?

The relevant sections of the Evidence Act that relate to this issue are s 55 and the explanation provided thereto. It is necessary therefore to reproduce both.

A 55 Character as affecting damages.

In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant.

Explanation — In ss 52, 53, 54 and 55 the word 'character' includes both reputation and disposition; but, except as provided in s 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition is shown.

I can do no better than to rely on the case of *Samrathmal v Emperor* AIR 1932 Nagpur 158, where Staples J said at p159:

The only other ground put forward by the learned counsel for the applicant was that the complainant was not a man of good character and that fact should have been taken into consideration in fixing the amount of fine and in awarding damages. The learned counsel referred to *Devidayal v Emperor* (AIR 1923 Lah 225). It is true that evidence under s 55, Evidence Act, about the character of a person is relevant in connexion with the amount of damages in civil cases, and a case of defamation is a quasi civil case. At the same time only general evidence of character or reputation can be given and not for instance, evidence of a particular conviction. In the present case the only evidence adduced by the applicant was that the complainant was once found guilty of using false weights. Such evidence is inadmissible in evidence under s 55, Evidence Act and according to the ruling cited.

The House of Lords had occasion to consider this issue in *Plato Films Ltd v Speidel* [1961] 1 All ER 876. The plaintiff was the Supreme Commander of the Allied Land Forces in Europe. He sued the defendants for libel, over a film published and exhibited by the defendants where he was portrayed as having been party to the murders of King Alexander and one M Barthou in 1934 and of having betrayed Field-Marshal Rommel to the Nazis in 1944. The defendants pleaded justification. However, they also sought to attack the character of the plaintiff in mitigation of damages. To this end, they provided particulars of their defence that allege that: (a) the respondent was responsible for or was associated with other actions of a shameful nature; and (b) that the plaintiff had a bad character because of certain other activities discreditable to him. The issue before the House of Lords was whether particular acts of misconduct could be pleaded and proved in mitigation of damages. The House of Lords held that in an action for defamation, evidence of the plaintiff's bad reputation in a sector of his life, relevant to the alleged libel was admissible in mitigating damages but evidence of specific acts of misconduct was inadmissible. This is truly the rationale behind our s 55 of the Evidence Act 1950.

Evidence of bad character must relate to the specific sting of the libel

Sarkar on Evidence (15th Ed) at p 990 clearly suggests that any evidence as to the character of the plaintiff must be confined to the particular area of his life or character that has been libelled. *Gatley on Libel and Slander* (9th Ed) states at para 33.30 as follows:

> *Reputation in relevant sector.* Evidence of general bad reputation must be confined to the sector of the plaintiff's character relevant to the libel. If the libel charges the plaintiff with treachery, evidence that he has a reputation for loose morals would be inadmissible in mitigation of damages.

Certainly a person may have a good reputation in relation to certain matters and a bad reputation in relation to others. Therefore, it cannot be said that the alleged libel has any connection with the finding of fact by the Court of Appeal in respect of the plaintiff's performance as a pornographic actor in a video.

The plaintiff claims compensatory, aggravated and exemplary damages.

Compensatory damages

The rules relating to the principles on which the quantum of damages is to be assessed have been crystallized from various cases. In *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun* [1995] 2 MLJ 493, the Court of Appeal referred to, with approval, a passage from *Sadasiba Panda v Bansidhar Sahu* AIR 1962 Orissa 115 at p 526. Misra J said at p 117 as follows:

> Every man has his own status, however humble, and he has a right to guard his reputation whatever it is, and the question of status is only relevant in measuring the question of compensation, and not in deciding as to whether there has been actual defamation in a case of a libel.

The Court of Appeal also approved a passage from the decision of the High Court of Australia in *Carson v John Fairfax & Sons Ltd* (1993) 113 ALR 577. The said passage reads as follows at p 526:

> Specific economic loss and exemplary or punitive damages aside, there are three purposes to be served by damages awarded for defamation. The three purposes no doubt overlap considerably in reality and ensure that 'the amount of a verdict is the product of a mixture of inextricable considerations': *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR per Windeyer J at p 150. The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation. The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant. Vindication looks to the attitude of others to the appellant: the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant's reputation. 'The gravity of the libel, the social standing of the parties and the availability of alternative remedies' are all relevant to assessing the quantum of damages necessary to vindicate the appellant.

Since the Court of Appeal had accepted and adopted these passages, I accept the said passages as propounding sound basis for assessment of damages.

Personal distress and hurt

The plaintiff has given evidence of the personal distress and hurt he had suffered. He testified that he was subjected to a great deal of mental

anguish, distress and anxiety. He felt hurt and upset that an innocent act of his for which he had made earnest and prompt recompense had been falsely portrayed as a criminal act. Further, he was anxious that this matter should not cause distress to his wife who was due for delivery of their child. In fact, he even hid the *Sunday Star* from her but unfortunately she saw the report in the *New Straits Times*. Knowing what the plaintiff had gone through, namely, having tumbled into the pit of ignominy, by being convicted of a criminal offence, from the dizzy heights of political power, the added insult of this defamatory publication must have represented to the plaintiff the ultimate in suffering. It was clear to all including the first defendant, that the plaintiff was, at that point of time, rebuilding his life. All the more do I see the act of publication by the first defendant by way of his press release, as a deliberate attempt to destroy the plaintiff's reputation as a lawyer. I must add a rider. To my mind, if a man is subjected to unnecessary vilification and as a result of which he is subjected to humiliation and ostracism, the suffering he himself undergoes must be magnified many times when he sees his family being affected by the shame and humiliation he has brought upon them through no fault of his own. In fact, I find support for this view from *Gatley on Libel and Slander* (9th Ed) at para 32.46 (p 824). The learned author states as follows:

> ... Evidence of mental suffering or illness caused by the publication, not to the plaintiff, but to his wife is not admissible if its purpose is to prove injury to the wife. But it has been held that the plaintiff can give evidence of the effect upon him of such distress as he observed of his wife and daughter.

Plaintiff's professional standing affected

The plaintiff has stated one instance of a lawyer who refused to accept a cheque from the plaintiff's firm in respect of a property transaction. He was never challenged on this. The first defendant argues that the plaintiff ought to have called this solicitor. To my mind, since there was no challenge there was no need for the plaintiff to have called this solicitor.

Complaint to Bar Council

After publishing the press statement, the first defendant made a complaint to the Bar Council. The Bar Council has no general disciplinary powers and can only move under s 88A of the Legal Profession Act 1976. It is well known that s 88A is a draconian provision that can suspend the plaintiff from practice pending full investigation of the complaint. However, even the Bar Council could not sustain the first defendant's complaint.

Complaint to the Disciplinary Board

Having failed in his complaint to the Bar Council, the first defendant referred the matter to the Disciplinary Board and, it would seem, the complaint is still pending.

Police report

The first defendant also made a police report against the plaintiff. The police report did not contain the defamatory allegations made by the first defendant in his press statement. Needless to say the plaintiff was, as a natural consequence, subjected to the further indignity of police investigations and the concomitant humiliation. In any case, the police found no evidence to proceed and informed the first defendant accordingly.

Social standing of the parties

The libel imputed a very serious criminal offence to the plaintiff. Section 420 of the Penal Code carries a maximum punishment of not less than ten years and whipping and also a fine. Moreover, the first defendant stated that the plaintiff was not fit to be on the rolls of advocates and solicitors and should be struck off.

The plaintiff is an established lawyer in practice since 29 January 1968, that is, for a period of 32 years. The law journals reflect the plaintiff's credentials as an advocate and solicitor. It is not in dispute that at one time he was a Parliamentarian and the Deputy Speaker of Parliament. The defendants have not disputed the fact that the plaintiff was indeed a public figure. Equally true is the fact that the first defendant himself is no push over. He is one of the leading criminal lawyers in this country and has of late even put his hand into leading civil suits that have indeed set precedents. He was elected to Parliament many times over until the last elections. In the circumstances, since both the parties are of high profile, the libel by one against the other must be considered in a more serious vein. Since both are well versed in the law, the act of libelling the plaintiff in the manner in which it was done smacks of absolute malicious intent.

As for both the newspapers, there is no denial of the fact that they can easily claim top readership of the national English dailies of this country. Having taken all the factors into account I award the plaintiff a sum of RM250,000 as compensatory damages against the first defendant. As against the second and third defendants for their abject failure to verify before publication I award a sum of RM100,000 against each of them.

Aggravated damages

Gatley on Libel and Slander (9th Ed) at para 9.13 p 212 aptly sums up what the court must consider in respect of aggravated damages:

> *Aggravated Damages.* The conduct of the defendant, his conduct of the case, and his state of mind are all matters which the plaintiff may rely on as aggravating the damages. '[I]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation.' The conduct of a

> defendant which may often be regarded as aggravating the injury to the plaintiff's feelings, so as to support a claim for 'aggravated' damages, includes the failure to make any or any sufficient apology and withdrawal; a repetition of the libel; conduct calculated to deter the plaintiff from proceeding; persistence, by way of a prolonged or hostile cross-examination of the plaintiff, or in turgid speeches to the jury, in a plea of justification which is bound to fail; the general conduct either of the preliminaries or of the trial itself in a manner calculated to attract wide publicity; and persecution of the plaintiff by other means.

The plaintiff urged me to consider awarding him a sum under this head. There is no doubt that at the time of making the statements in the impugned articles the first defendant was a prominent opposition leader and Member of Parliament who was held very high in esteem both locally and overseas. I am therefore bound to hold that with such high fame must come added responsibility and that therefore it was absolutely incumbent upon the first defendant to adhere to a very high standard of responsibility when making allegations. In this case I have no doubt that anger and an overbearing attitude blinded this highly acclaimed individual and prevented him from taking a just and reasonable view of the plaintiff's mistake. I am also constrained to hold that the first defendant himself being a leading lawyer ought to have exercised a high degree of responsibility before accusing the plaintiff of conduct that was totally unjustified. The callous and hard-hearted attitude laced with contemptuous remarks as contained in his letter such as 'We fail to understand what is bugging Vijandran' clearly showed that the first defendant was totally unconcerned as to the feelings of the plaintiff. The letter to me reflects the view that the first defendant is a person who believes that whatever he says must be accepted even by the plaintiff and that whatever he had said in respect of the plaintiff ought not to bug the plaintiff. There is no doubt in my mind that there is express malice. The petty feuds commenced during their student days had escalated into full blown battles between these two protagonists enacted in court rooms, in political forums, in Parliament and even in their ordinary lives.

Suppression of material facts

Another factor that the court has to consider in respect of this head of damages is the suppression of material facts by the first defendant. He filed a complaint with the Disciplinary Board against the plaintiff. Yet he had in that complaint omitted to mention the events and correspondence between his firm and the plaintiff and the fact that the plaintiff had as soon as possible sent a replacement cheque which the first defendant received and cashed in accepting the full amount. Further, even in his police report he had deliberately omitted to mention material facts which could very well have prevented the publication of the impugned articles by the two defendants.

Repetition of the libel

Then on 30 March 1996 the first defendant repeated his allegations against the plaintiff by issuing a further press statement reproducing the report in

The Star of 3 March 1996. He even asked the police and the Bar Council to act speedily. When the Bar Council replied stating that the complaint by the first defendant was not appropriate for action by them under s 88A of the Legal Profession Act 1976, the first defendant did not make this letter public, thus mitigating the damages. Even when he received the official notification from the police that the police investigations into the allegation regarding the first cheque which was initiated by the first defendant's police report, had been completed and the case classified as 'no further action', the first defendant did not publish this fact. I am satisfied that malice was the main factor that goaded the first defendant to make the impugned statements. Further, the fact that the first defendant did not take the stand to face the cross-examination leads this court to conclude that the plaintiff's evidence as against the first defendant and the inferences drawn by the plaintiff against the first defendant, stand unrebutted.

Plaintiff's standing as a lawyer

The first defendant's allegation that the plaintiff had committed an offence of cheating under s 420 of the Penal Code struck at the very root of the plaintiff's standing as a practising lawyer. There is no doubt that a lawyer's most important asset is his financial integrity, without which his ability or experience is meaningless in the eyes of the public. Since the first defendant is a very prominent and leading criminal lawyer, his allegation of a criminal offence against the plaintiff must be considered as all the more damaging as the ordinary man in the street would definitely believe that Mr Karpal Singh knows what he is talking about. There is no doubt that in making the imputations against the plaintiff, the first defendant knew that he was making a false accusation and had deliberately suppressed the truth.

No apology tendered

The first defendant has not shown any remorse nor has he tendered any apology for the libel. On the other hand, he has fought the case to its conclusion. Having considered all these factors with their cumulative effect, I award the plaintiff a sum of RM250,000 as aggravated damages as against the first defendant.

The second and third defendants' main argument in respect of damages has been that they were innocent disseminators of the press statement given to them by the first defendant. This is no defence. The second and third defendants as newspaper publishers have the high responsibility of verifying their information before publishing. It is not without reason that it is said that the pen is mightier than the sword. The second and third defendants have in them such awesome power. They move public opinion. Putting the blame on the first defendant is no answer to the plaintiff's claim for damages against them. They admit that if they had known about the letters from the plaintiff and the replacement cheque they would not have published the reports. This to my mind simply underscores their responsibility. They could have easily contacted the plaintiff for verification; but they would rather accept as true the words of the first defendant no doubt, because of

his high office and public acclaim. For such blind faith the second and third defendants must pay.

Another aggravating factor that I find against the second and third defendants is their blatant refusal to give a copy of the first defendant's press statement to the plaintiff despite repeated requests. All I can conclude by this act is their desire to frustrate the plaintiff and make it difficult for him to get the truth.

Further, even after knowing about the letters from the plaintiff and the replacement cheque and having admitted that if they had known of these they would not have published the reports, the second and third defendants have not to date published an apology. Having considered all these factors I award against each of the second and third defendants a sum of RM100,000 as aggravated damages.

Exemplary damages

I have gone into great detail in respect of this head of damages in the case of *Abdullah Sani bin Hashim v Sharma Kumari* (Guaman Sivil No S2(S5)–23–08–1998(2)) and I do not intend to repeat the law as stated therein. The key to awarding damages under this head is the 'benefit test'. The plaintiff argues that it would be an added feather in the cap of the first defendant being the Deputy Chairman of the Democratic Action Party, being the opposition party, to be able to publicly ridicule a member of the Malaysian Indian Congress which is a component of the Barisan Nasional, the ruling party. I am not at all convinced of this aspect and I reject any claim by the plaintiff under this head in respect of all defendants.

Indemnity

Claim of indemnity by the second defendant against the first defendant

It is the submission of the second defendant that if the court holds that at the time of the issuing of the press statement by the first defendant, he knew that the cheque which had been returned had been replaced, then the representations in the press statement were 'not only negligent but reckless'. The second defendant admits that the first defendant being a Member of Parliament and the Deputy Chairman of the DAP, which at that material time was the leading opposition party, ought to have known that the second defendant would publish a report in reliance upon the first defendant's press statement. The second defendant thus raises the question of a duty of care on the part of the first defendant towards the second defendant since the first defendant knew that the second defendant would rely on his statement to write the story. Whilst the second defendant had issued a notice seeking indemnity against the first defendant, I cannot accept the submission seeking indemnity. No evidence was led by the second defendant that it would rely on negligence to support its claim for indemnity. No witness for the second defendant testified towards this end. In any case, I had already found that even if the first defendant had issued the press statement, the second defendant was reckless in publishing

the same or the contents of the same without ascertaining the truth of the same from the plaintiff. The second defendant must bear the consequences of its own folly. The claim for indemnity is totally misconceived and is denied.

Claim of indemnity by the third defendant against the first defendant

The question of a duty of care as raised by the third defendant has already been considered by me earlier. If the third defendant talks of a duty of care it is the third defendant itself that has blatantly breached this duty of care by failing to cross-check the contents of the press statement with the plaintiff. Having failed to act prudently on its own behalf it is to my mind an act of desperation on the part of the second and third defendants to pin the blame totally on the first defendant. If the first defendant was foolhardy, the second and third defendants were no different. They must each be liable for their own conduct. The claim for indemnity must fail.

Conclusion

It is always difficult to assess damages in a defamation action. What is the value to be placed upon a person's character. Having done a public post-mortem of a person's character, is the judge's evaluation of that person's character and conduct in monetary terms, sufficient recompense? Would an award of damages finally constitute sufficient restitution? This is a perennial question that will continue to be asked and answered. However, I find comfort in the words of Lord Denning in his 'What next in the Law'. This is what that famous judge and jurist had to say at p 171:

> I ask: What is the reason why the law awards damages for libel? In some cases the libel causes a man 'special damage' as it is called. He loses his job or he loses business. But in the great majority of cases he loses nothing in money. He cannot prove that he suffered a heavy loss by reason of the libel. He is annoyed and angry - very angry indeed — but he does not think of taking revenge by force. He does not think of going to the editor and punching him on the nose. There is no breach of the peace or danger of it. Insofar as he is angry — insofar as his feelings are injured — money can do him no good. His anger cannot be measured in money terms. All that can be done on that score is to award him something by way of a solatium.

It is important for this court to consider the fragile fabric called reputation. Unfortunately this is the land of the 'surat layang', of gossip and rumour that sends tremors through such staid and venerable institutions such as the judiciary, the government and even the stock exchange. There is a continuous miasma of 'no smoke without fire' assumption going around in circles amongst the general public. There is no real protection from the cowardly and irresponsible elements who attack one's character from the covert pages of anonymous letters. With such a setting, if a person such as the first defendant, who is well versed in the law, makes irresponsible and hurtful imputations to assassinate another's character, it is only proper that he be dealt with, otherwise it would seem as an encouragement to all irresponsible elements, especially those who now operate under cover of

'surat layang' to be more emboldened and to be openly adventurous. No doubt the courts are the final bastion for those assailed by character assassinations. It is necessary for me to repeat what I said in *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* at p 537:

> ... Subject to the caveat that if one transgresses the borderless line of freedom of speech and enters the uncharted mine-field of malicious libel or slander, one is liable to face a suit for defamation, the court must, in order to ensure that there is no such transgression, stand as a silent sentinel, ever vigilant, never indolent, as a bulwark towards freedom of speech.

As for the second and third defendants, they cannot, in my view, seek a vested right to put their own interpretation upon the impugned statement by either selecting lines or passages out of context or giving the reader a different meaning from what would appear when the statement is read on its own.

Finally, it is appropriate for me at this juncture to advise both the plaintiff and the first defendant to forget this acrimony and hatred. Each of them is no longer a student. They are leaders in their own right. They cannot or ought not to be seen to be harbouring and further nurturing this animosity. It is time to put things to rest and to bury the hatchet. The parties should recall the words of HW Longfellow in *The Song of Hiawatha XIII*:

> Buried was the bloody hatchet.
> Buried was the dreadful war-clubs.
> Buried were all war-like weapons,
> And the war cry was forgotten.

(The Great Spirit had commanded the North American Indians, when they smoked their peace pipe to bury their hatchets, scalping knives and war-clubs so that all signs of hostility might be put out of sight.)

The award is therefore as follows:

As against the first defendant		
(1)	compensatory damages	RM250,000
(2)	aggravated damages	RM250,000
(3)	exemplary damages	nil
As against each of the second and third defendants		
(1)	compensatory damages	RM100,000
(2)	aggravated damages	RM100,000
(3)	exemplary damages	nil

As against all defendants

An injunction to restrain the defendants whether by themselves, their servants or agents or otherwise howsoever from further publishing the said or any similar words defamatory of the plaintiff.

The plaintiff will have interest on the awards at 4% per annum from the date of the press statement in respect of the first defendant and from the date of publication in respect of each of the second and third defendants. The plaintiff will have his costs as against each of the defendants.

Plaintiff's claim allowed.

Reported by Andrew Simon Christopher